



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 23, 1993

Ms. Georgia Flint
Commissioner
Texas Department of Insurance
1110 San Jacinto Street
Austin, Texas 78701-1998

OR93-348

Dear Commissioner Flint:

The Department of Insurance (hereinafter "department") asked whether information about First Service Life Insurance Company ("FSLIC") and Knickerbocker Life Insurance Company ("KLIC") is subject to public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. This file concerning your request has been designated ID# 18802.

The request for information provides as follows:

The undersigned requests that he be permitted to inspect and have copies made of any and all records pertaining to First Service Life Insurance Company, its predecessors, parents and subsidiaries, collectively referred to as "First Service". This request includes, but is not limited to the following:

1. All information relating to the licensing of First Service;
2. All memoranda, notes, correspondence and other information relating to its incorporation, re-incorporation and license status;

3. All information relating to the licensing of agents with First Service including the names of the agents and dates of issuance of such licenses of each such agent;
4. The identity of and dates of purchases and sales by all holders of annuities issued by First Service;
5. The name and most recent address of all officers, employees, agents and consultants of the insurance department who were assigned to and worked on the files of First Service including the dates and durations of any on-site visits to the offices of First Service and/or meetings with its officer, directors and employees, including but not limited to, . . . [four named persons];
6. Any and all reports submitted by any of the individuals identified in the preceding request;
7. All documents relating to any reports of examination prepared by or received by the State of Insurance Board regarding First Service;
8. All documents relating to any notices or advice given to any party by the Texas State Board of Insurance regarding the licensing of First Service;
9. All files relating to any of the following policy holders: . . . [naming eight persons and entities], including individual file folders on such individuals including their initial application, purchases and redemption, correspondence and all other material contained in such file[s];
10. All files regarding . . . [specified agent for First Service], including all licenses issued to and notices of cancellation of licenses of . . . [that person];
11. All files relating to Eppler, Guerin & Turner, Inc.;

12. Any and all correspondence between the insurance department and any other governmental agency relating to First Service including any correspondence with the Attorney General's office requesting that any action be taken against any entities or individuals.

Documents among the records you have submitted show that FSLIC was placed under conservation on June 18, 1988. The commissioner of insurance may place an insurance company under conservatorship, upon determination that the company is insolvent, "or its condition is such as to render the continuance of its business hazardous to the public or to holder of its policies," or it is not in compliance with the law. Ins. Code art. 21.28-A, § 3. The commissioner, or conservator appointed by the commissioner, takes charge of the insurance company, its property and effects, and is granted various statutory powers to rehabilitate the company and to protect its assets. Ins. Code art. 21.28-A, § 3; *see Reyes, Insurance Company Liquidation in Texas -- "The Basics,"* 51 TEX. B. J. 957, 958 (1988). If rehabilitation is not possible, the commissioner will recommend that a petition be filed by the attorney general seeking to place the company in receivership. *Reyes, supra* at 958.

FSLIC was placed under temporary receivership on December 1, 1988, and under permanent receivership on January 18, 1989. This company is also the subject of an investigation by the Unauthorized Insurance Division of the department. KLIC was placed in conservation on September 22, 1987, and was placed in receivership after this request was sent to us. Your agency has recently informed us that First Service Life Insurance Company and Knickerbocker Life Insurance Company are both still in receivership under special deputy receivers.

You claim that some of the records are in the possession of the judiciary, and therefore not subject to the requirements of the Open Records Act. *See* V.T.C.S. art. 6252-17a, § 2(H) (judiciary is not a "governmental body" within the Open Records Act); Open Records Decision No. 610 (1992). You raise sections 3(a)(1), 3(a)(3), 3(a)(7), 3(a)(11), and 3(a)(12) with respect to the remaining documents.

The representative samples that you have submitted include information about the insurance companies gathered by the department while they were under conservatorship, information acquired by the receiver while the companies were in receivership, information collected by the department relevant to engaging in the unauthorized

business of insurance,¹ records of the insurance company, including information about policyholders, correspondence to the department from policyholders, and communications among the various persons associated with the department and the insurance companies in question.

We will first address your claim that some of the records are records of the judiciary. Records of an insurance company in receivership that are held by the receiver pursuant to court authority are judicial records and therefore not subject to the Open Records Act. Open Records Decision No. 610. Some of the information requested from FSLIC and KLIC consists of records in the custody of the receiver, held pursuant to the authority of the court. For example, we have received an affidavit from the attorney for the receiver of KLIC stating that 2,278 boxes of records of the company have been inventoried. Such records are records of the judiciary and are not subject to the Open Records Act. The information requested under items 4 and 9, records identifying annuity holders and files relating to ten named policy holders, are records of the insurance company in the receiver's possession pursuant to court authority and therefore are not subject to the Open Records Act.

Section 3(a)(1) of the Open Records Act excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," from disclosure to the public pursuant to the Open Records Act. You state that letters of complaint to the board about the insurance companies and insurance agents are protected by the judicially-recognized "informer's privilege" as incorporated into section 3(a)(1) of the Open Records Act. You also suggest that the informer's privilege applies to witness statements recorded by agency investigators in the course of investigating possible violations of the Insurance Code by insurance companies and licensed agents.

The "informer's privilege" protects the identity of persons who report violations of the law to officers charged with enforcement of that law. *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The privilege may be raised by administrative agency officials having a duty of law enforcement within their particular sphere. Attorney General Opinion MW-575 (1982); Open Records Decision No. 391 (1983). Article 1.10, section 1 of the Insurance Code charges your agency with enforcing the Code, for example, by revoking licenses and permits and by requesting the Attorney General to bring civil actions against the unauthorized practice of insurance. See Ins. Code art. 1.10, § 5 (commissioner's authority to order company to remedy impairment of surplus or to cease to do business in Texas), § 7 (cancellation of permits, licenses, and certificates of authority if holder is in violation of code or of rules or regulations promulgated

¹The Unauthorized Insurance Section of the department had access to the records of FSLIC under the authority of Insurance Code article 1.14-1, section 9, after FSLIC was placed in receivership.

thereunder); art. 1.10A, § 4 (enforcement of cease and desist orders by attorney general). However, if information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision Nos. 515 (1988), 191 (1978).

The records show that the department interviewed FSLIC policyholders in investigating agents and received letters from FSLIC policyholders responding to a request from the Unauthorized Practice Division of the department for information helpful to its investigation. Thus, the department sought out policyholders as witnesses, and they did not spontaneously come forward to report violations. Some policyholders voluntarily wrote to the department or to other state agencies stating concerns and complaints about FSLIC, but the letters we have examined do not report conduct that violates the law. The informer's privilege does not except any of the information included in the representative samples you have sent us.

Section 3(a)(1) also prevents the disclosure of private information about a person. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (information within a common law or constitutional right of privacy is excepted from disclosure under the Open Records Act by section 3(a)(1)). Documents in the possession of the department include personal financial information about FSLIC policyholders, such as the amount of premium paid for policies and the identity of the beneficiary. These documents are excepted from disclosure by section 3(a)(1) of the Open Records Act to the extent that they include personal financial information about the policyholders. *See* Open Records Decision Nos. 545 (1990), 523 (1989). We have marked them accordingly.

Section 3(a)(3) of the Open Records Act, the litigation exception, permits you to withhold information relating to litigation and settlement negotiations, to which the state is, or may be, a party, that the attorney general has determined should be withheld from public inspection. V.T.C.S. art. 6252-17a, § 3(a)(3). You claim that this exception applies to investigative reports, witness statements, and correspondence between the department and third parties.

Some of the information submitted to us, for example, information about FSLIC developed while it was under conservatorship, relates to the pending lawsuits that placed the insurance companies in receivership. *See generally* Ins. Code art. 21.28, § 4(b) (court may at any time during proceeding under section 21.28 issue injunctions or orders). Documents in the possession of the department that are relevant to the lawsuit establishing the receivership are protected by section 3(a)(3). However, if these documents have been released to the opposing party in discovery or otherwise, the protection of section 3(a)(3) no longer applies to them. *See* Open Records Decision No.

349 (1981). Records held by the receiver concerning lawsuits to which the receivership estate is a party are not subject to the Open Records Act. Open Records Decision No. 610.

You claim that your Enforcement Section is investigating the agent specifically referred to in item 10 and that the investigation will probably result in a disciplinary hearing. Such information may be withheld pursuant to section 3(a)(3) as information related to contemplated litigation in an administrative forum until the agent obtains it through administrative discovery or otherwise. Open Records Decision No. 588 (1991). We have marked the information excepted from disclosure by section 3(a)(3).²

Section 3(a)(12) of the Open Records Act, which permits you to withhold the following information:

information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, and/or securities, as that term is defined in the Texas Securities Act. . . .

Examination reports of insurance companies are within this provision. Open Records Decision No. 158 (1977). The sample records include examination, operating, or condition reports about the insurance companies prepared for the use of the department in regulating them. These records may be withheld under section 3(a)(12). We have marked them accordingly.

²Section 3(a)(7) of the Open Records Act excepts from disclosure:

matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure.

There are some documents that might be excepted by this provision, but we have already determined them to be excepted by section 3(a)(3); thus, we need not consider at this time whether section 3(a)(7) applies.

You state that providing the records requested in items 4 and 5 would require research and compilation and it is unclear what combination of documents would be needed to produce this information. The information described in item 4, *i.e.*, the identity and other information about all holders of FSLIC annuities, would generally be in the possession of the receiver pursuant to judicial authority and would not be available the requestor under the Open Records Act.

With respect to item 5, the Open Records Act does not require a governmental body to do research in its files or to prepare information in a form specified by the requestor. Attorney General Opinion H-90 (1973). However, you must make a good faith effort to assist persons entitled to information to receive it, by attempting to identify records that might fit the request and then advising the requestor of the types of documents available so that he may narrow his request. Open Records Decision Nos. 87 (1975); 31 (1974). Although you state you are unable to assemble the names of "all officers, employees, agents, and consultants of the insurance department who were assigned to and worked on the files of First Service," including dates of visits to FSLIC and meetings with its officers, some of these names are included in the representative documents and can be provided to the requestor by redacting any confidential information in the document and releasing only the names of these persons.


Finally, you claim that various records, including records described by items 1, 2, 6, 7, and 12, constitute "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency," under section 3(a)(11) of the act, and therefore excepted from required public disclosure. For several months now, the effect of the section 3(a)(11) has been the focus of attention in response to a judicial decision. In *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 413 (Tex. App.--Austin 1992, no writ), the Third Court of Appeals held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." The court has since denied a motion for rehearing in this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, however, you still desire to seek closure of the information pursuant to this section, you may submit additional detailed arguments as to the application of section 3(a)(11) in your case, making sure to mark the documents to show which portions you believe are excepted by this provision. You must submit any additional comments within 14 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath*

decision. As discussed above, we conclude that no other exception to required public disclosure applies to some of the documents you have submitted. Therefore, if you do not timely submit further arguments concerning the application of section 3(a)(11), we will presume that you have released the information that is not within any of the other exceptions you have cited.

If you have any questions with regard to this letter, please contact this office.

Yours very truly,



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Opinion Committee

SLG/jmn

Ref.: 18802

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